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MEMORANDUM OF LAW

DATE: April 14, 1997

TO: Charles G. Abdelnour, City Clerk

FROM: City Attorney

SUBJECT: Effect of Proposition 208's Time Limits on Fundraising by Recall Committees Formed in San Diego

BACKGROUND

You have asked the City Attorney to advise you about how Proposition 208, passed by California voters on November 5, 1996, affects committees established to recall an elected official of The City of San Diego, particularly in regard to the time periods permitted for fundraising.¹ Proposition 208 amends the Political Reform Act of 1974, which is codified at California Government Code sections 81000-91015.

Among other things not relevant to your question, Proposition 208 establishes specific time periods when fundraising for candidate elections is prohibited. Cal. Gov't Code § 85305. Essentially, it prohibits candidates and committees in districts with fewer than 1,000,000 residents from raising funds earlier than six (6) months prior to an election; and, it prohibits candidates and committees in districts with 1,000,000 residents or more from raising funds earlier than one (1) year prior to an election. Cal. Gov't Code § 85305(a) and (b).

¹For purposes of this memorandum, we assume Proposition 208 is valid. We note, however, that a law suit has been filed in federal district court in Sacramento challenging virtually all of Proposition 208's contribution and expenditure limits. Plaintiffs include political parties, special-interest PAC's, unions, candidates and lobbyists. The primary defendant is the Fair Political Practices Commission. U.S. District Court Judge Lawrence K. Karlton has set a trial date of October 15, 1997. L.A. Daily Journal, Mar. 14, 1997, at 3.

This memorandum addresses the sole issue of whether Proposition 208's fundraising time limits apply to recall elections in this City.

QUESTIONS AND SHORT ANSWERS

Question 1: At what point may a recall committee lawfully begin collecting contributions for the purpose of gathering signatures to recall a City official who was elected City-wide and who has not yet held office for six (6) months?

Answer 1: The recall committee may begin fundraising once it files the proper statement of organization form with the Secretary of State. The fact that a recall proceeding may not lawfully be commenced at that time is irrelevant.

Question 2: At what point may a recall committee lawfully begin collecting contributions for the purpose of gathering signatures to recall a City official who was elected City-wide and who has held office for six (6) months or more?

Answer 2: The answer is the same as the answer to Question No. 1.

Question 3: At what point may a recall committee lawfully begin collecting contributions for the purpose of gathering signatures to recall a City official elected by district and who has not yet held office for six (6) months?

Answer 3: The answer is the same as the answer to question No. 1.

Question 4: At what point may a recall committee lawfully begin collecting contributions for the purpose of gathering signatures to recall a City official elected by district and who has held office for six (6) months?

Answer 4: The answer is the same as the answer to Question No. 1.

ANALYSIS

Your questions go to the heart of whether the Political Reform Act of 1974, as amended by Proposition 208 adopted in November 1996, applies to this City's recall elections, and if so, with what effect. If applicable to a particular election, Proposition 208 imposes time limits on when campaign fundraising may take place both before and after an election. In contrast with Proposition 208, the City's campaign finance laws contain no time limits on when fundraising may take place. San Diego Municipal Code §§ 27.2901-27.2975.

Does fundraising alone trigger a recall proceeding? It does not. The City Attorney has stated that a recall proceeding may not be commenced against an elected official in this City until six (6) months have elapsed from the commencement of the officeholder's current term. San Diego City Attorney Memorandum of Law No. 97-7, Feb. 26, 1997. In a separate memorandum of law, the City Attorney has expressed his opinion that formation of, and fundraising by, a committee in support of or against a recall effort does not trigger a recall proceeding. San Diego City Attorney Memorandum of Law No. 97-9, Mar. 20, 1997. Likewise, neither forming a committee nor fundraising by that committee constitutes an unlawful attempt to commence a recall proceeding. Id. A committee may begin fundraising once it files the requisite statement of organization with the Secretary of State. Id. Copies of both of these memoranda of law are attached for your convenience.

In a recent key decision, the Fair Political Practices Commission (Commission) decided that Proposition 208's contribution limits do not apply to recall elections. In re Cohen, Priv. Adv. Ltr. I-96-364 (Feb. 18, 1997). The Commission's decision in the Cohen letter was re-enforced in an even more recent advice letter in which the Commission stated that Proposition 208's limits do not apply to replacement candidates in a recall election. In re Davidson, Priv. Adv. Ltr. I-97-103 (Mar. 26, 1997).²

The basis of both the Cohen and Davidson letters is the Commission's determination that recall elections are considered ballot measure elections under the Political Reform Act. In the Cohen letter, the Commission concluded that, "[t]he recall of an officeholder is considered to be a 'measure' under the [Political Reform] Act and therefore the contribution limits of Proposition 208 do not apply to the proponents of the recall or to contributions to the officeholder defending the recall." The Commission in Davidson said similarly, "[a] recall is considered to be a ballot measure under the [Political Reform] Act and candidates running in a recall election are not subject to contribution limitations."

The City Attorney analyzed the Cohen letter at length in his memorandum of law of March 20, 1997. That analysis will not be repeated here. Significantly, in his March 20th memorandum, the City Attorney determined that (1) Proposition 208's contribution limits do not apply to recall elections in this state; and, (2) the City's campaign finance laws do apply.

²The Davidson letter actually dealt with the applicability of Proposition 208's contribution limits to candidates running for the Los Angeles City Charter Reform Commission, not recall candidates, on an April 8, 1997, ballot. The Commission likened the charter commission candidates to replacement candidates in a recall election, because the candidates for the charter reform commission were on the same ballot as the ballot measure question itself, that is, whether the charter reform commission should be created or not.

The Commission has not directly issued a ruling on whether Proposition 208's time limits on fundraising apply to recall elections. However, in light of their finding in the Cohen and Davidson letters that recall elections are ballot measure elections for purposes of the Political Reform Act, it is highly likely that the Commission would hold that Proposition 208's "black out" periods for fundraising do not apply to recall elections. The only way to be sure of their ruling would be to ask the Commission directly.

CONCLUSION

The Commission has ruled that Proposition 208's contribution limits do not apply to recall elections, because recall elections are treated as ballot measure elections under the Political Reform Act. Given the Commission's reasoning justifying their refusal to apply Proposition 208's contribution limits to recall elections, it is likely that they would also refuse to apply Proposition 208's time limits on fundraising to recall elections. The City's campaign finance laws contain no time limits on fundraising before an election. Therefore, a recall committee may begin fundraising once it files the proper statement of organization form with the Secretary of State.

CASEY GWINN, City Attorney

By

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Deputy City Attorney

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Attachments

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